82-1476

CASE NO.
UNITED STATES SUPREME COURT
OCTOBER 1982 TERM

KENNETH RICHARD INNELLA,	:	
Defendant-Petitioner,	:	On Writ of Certiorari
adv.	:	to the U.S. Court of
UNITED STATES OF AMERICA,	:	Appeals for the 11th
Plaintiff-Respondent.	:	Circuit
	:	

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT

JOHN J. PRIBISH, ESQ.
850 US Highway 1
No. Brunswick, NJ 08902
(201) 246-4884
Attorney for Defendant-Petitioner Kenneth Richard Innella

On the Brief:

PATRICK F. McANDREW, ESQ.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a criminal defendant has received Constitutionally required effective assistance of counsel or, whether, in the interest of protecting the integrity of the judicial process and the appearance of justice, this Court should exercise its supervisory powers to afford Petitioner a new trial where his prior trial began under the following circumstances:

   a. at the outset of trial, the Defendant requests a continuance to have new counsel of his choice; and

   b. trial counsel then indicates to the Court that the dissension between counsel and client arose because counsel would not let the defendant take the stand in his own defense and lie as the defendant planned to do (assuming arguendo this is true); and

   c. the Court nevertheless forces the defendant to go through trial with the very same trial counsel.

TABLE OF CONTENTS AND TABLE OF AUTHORITIES[1]

[1] Pursuant to S.Ct. Rule 21.1(b) a list of parties is not necessary since the names of all the parties are contained in the caption of the case.

AUTHORITIES:

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

COURT RULES

OPINION BELOW

On appeal:
U.S.A. v. Innella, 690 F.2d. 834 (11th Cir. 1982)

Grounds For Jurisdiction

i. Judgment to be reviewed - Decision of the 11th Circuit Court of Appeals in U.S.A. v. Innella, 690 F.2d 834 (11th Cir. 1982), decided on November 1, 1982 and entered as mandate on January 3, 1983, which affirmed the Decision of the trial court, United States District Court, District of Georgia, Hon. Charles Moye, on Petitioner's application for a continuance to obtain new counsel and permission to discharge trial counsel, which was heard and decided on February 16, 1982.

ii. Suggestion for Rehearing En Banc submitted to the 11th Circuit court of Appeals on November 22, 1982; Suggestion returned by Clerk of the Court "unfiled" at the instructions of Chief Judge Godbold, on December 23, 1982.

iii. Petitioner has been convicted of violating a federal statute, 21 U.S.C. §841(a)(1) and 21 U.S.C. §846. This court has jurisdiction to hear this matter pursuant to 28 U.S.C. §2365(

Constitutional Provision Involved

Amendment V, which states in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law."

Statement of the Case - Facts

This appeal and petition for certiorari involve a claim of ineffective assistance of counsel at Petitioner's trial.

Petitioner was indicted, along with others, on or about September 16, 1981, by a U.S. Grand Jury sitting in Atlanta, Georgia. He was charged with conspiring to possess for distribution cocaine hydrochloride (a violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §846) and with aiding and abbetting an attempt to possess for distribution cocaine hydrochloride (a violation of 21 U.S.C. §841(a)(1).

After entering a plea of not guilty and making several motions not pertinent here, Petitioner proceeded to trial[2]. On or about January 29, 1982, however, Petitioner's retained trial counsel filed a motion for a Leave of Absence. The motion was supported by a letter from trial counsel's doctor. The court granted the motion and authorized a leave of absence for trial counsel covering the period between February 1, 1982 to February 7, 1982.

---

[2] These pre-trial motions were made for Petitioner by trial counsel. The motions were for a Bill of Particulars, for discovery, for a severance, and for Brady material. Severance was denied while the remaining motions were granted in part and denied in part.

A second motion was made by trial counsel for extended leave of absence. This too was granted and a leave of absence was allowed until February 16, 1982.[3]

Finally, on February 16, 1982, this case was called for trial before the Honorable Charles Moye, sitting with a jury. Immediately prior to trial commencing, the Petitioner made an application in open court to the trial judge to discharge trial counsel and for a continuance to allow new counsel to appear. Petitioner had secured alternate counsel who had to first conclude a trial in another state (T.2/16/82 pp3-5).

Petitioner presented his application to the trial judge, without the jury being present, in an extremely disjointed and inarticulate manner. This is evident, as is Petitioner's extreme nerviousness, from the face of the transcript. See T.2/16/82 pp3-5.

The court denied Petitioner's oral application and at that point trial counsel rose and told the trial court, in effect, that the cause of the disagreement between

---

[3] For approximately two weeks prior to beginning trial, Petitioner's trial counsel was under doctor's care and obviously unable to effectively prepare for the upcoming trial of Petitioner.

Petitioner and trial counsel was that Petitioner wanted to take the stand and lie and trial counsel could not be a party to such tactics.[4] T.2/16/82, pp5-6. Specifically, trial counsel said:

> There is a severe breach with Mr. Innella and myself as to the presentation of his defense. Mr. Innella, insists that he must take the stand, and that there are possibly one or two additional witnesses that he indicates he would like to testify in his defense.
>
> In good conscience, legal and moral and ethical, I feel I could not aid and abet such testimony. This came about several weeks ago. I had gone to New Jersey on several occasions. Prior to my illness, he came down and we felt that we had resolved that situation.

[4] Petitioner did not plan any such thing. On the contrary, Petitioner did not want to take the stand and it was trial counsel who wanted Petitioner to testify and concoct a story. On the evening of February 15, 1982, just prior to trial, Petitioner informed counsel that he could not take the stand under any circumstances and that he wanted to discharge trial counsel.

Petitioner and present counsel are fully aware of the seriousness of these charges against trial counsel. They are brought to this Court's attention, as they were to the attention of the Appellate Court below, in order to safeguard these issues if they must be raised on a Petition for Writ of Habeas Corpus, out of ethical concerns, and to present a correct statement of the facts.

As will be seen, however, this Court may disregard these charges and focus solely on the record. Taking Counsel's statement to the Court and assuming it is true, a reversal and new trial is nonetheless appropriate.

> Then I was out; and was out of communication with Mr. Innella. Mr. Innella -- last night, I had an occasion to meet him and he had told me he had tried to communicate with me on Friday and that his attorney had tried to communicate with me. That could have been well possible because both phones -- I was not answering the phone. I was at home. I just -- I certainly am charged with responsibility of doing the utmost in his defense, at the same time, I could only proceed within the limits that I'm permitted to. I do feel that there is more than just a mutual dissatisfaction but there is a severe breach.
> T.2/16/82, p.5, L.10-25, p.6, L.1-6.

The trial court then advised Petitioner that new counsel would be allowed only if new counsel could appear immediately, see T.2/16/82 p.6, L.6-12; otherwise the application was denied. Later that morning, the trial court was informed through the clerk that Petitioner's new counsel had trial commitments which made an immediate appearance impossible. T.2/16/82 p.11, L.22-23. The application for a continuance was again denied and trial went forward.

Petitioner, defended by trial counsel, was ultimately found guilty on both counts. On April 6, 1982, the trial court, prior to pronouncing judgment, denied present counsel's motion on behalf of Petitioner for a continuance and, if need be, to complete or supplement the record. T.4/6/82, p.35. Petitioner was then sentenced to two 15-year

prison terms, to be served consecutively, and a total of $50,000 in fines. T.4/6/82, p.22.

Petitioner then appealed to the United States Circuit Court of Appeals for the 11th Circuit. The decision of the trial court was affirmed in a written decision dated November 1, 1982 (Pa1)[5]. On November 22, 1982, Petitioner submitted a Suggestion to the Court of Appeals for a Rehearing En Banc. This was submitted pursuant to and in compliance with the Rules of the Court.

By letter of Chief Judge Godbold, dated November 24, 1982, however, Petitioner's counsel was informed by the Chief Judge that

> I am directing the clerk of this court to return to you the petition for rehearing/rehearing en banc received by the clerk November 22, 1982. It will not be accepted for filing. (emphasis added)[6]. (Pa7)

---

5 Page references to Petitioner's Appendix will be by the designation "Pa1, Pa2, Pa3. . ." etc.

6 The Suggestions which were ultimately returned had been marked "Filed - November 22, 1982" by the Clerk but this marking was covered over by the Clerk with white stick-on paper.

The basis of the rejection for "filing" was that the Judge deemed improper present counsel's contentions that trial counsel wanted Petitioner to lie to the trial court and that trial counsel's statement to the trial court, was not only against his client interests, but also false. These contentions had been raised before the appellate court out of ethical concerns, to preserve issues on appeal and in order to accurately present the facts. Nonetheless, the Suggestion for Rehearing En Banc, which was never accepted even for "filing", contrary to the Court's rules, focused and concentrated on the record and the statement of trial counsel taken at face value. The Suggestion assumed trial counsel spoke the truth.

A letter was written by present counsel to Judge Godbold (Pa9) to request a reconsideration of his unilateral directive to reject for filing the Suggestion for Rehearing. Present counsel was informed by Judge Godbold, in his letter dated December 13, 1982 (Pa14), that the Suggestion would not be accepted for filing and "[i]f you wish to file an <u>appropriate petition</u> for rehearing/rehearing en banc, you are allowed 15 days in which to do so." (emphasis added) (Pa17). The Suggestion for Rehearing En

Banc, which was never formally accepted for "filing" and deemed inappropriate was ultimately returned by the Clerk to present counsel on December 23, 1982.[7] (Pa18).

The Judgment of the Circuit Court of Appeals was entered and issued as mandate on January 3, 1983. Peititoner now submits this Petition for Certiorari and asks this Court to reverse that judgment.

Statement of the Case-Federal Jurisdiction

Jurisdiction was appropriate in the court of first instance, the U.S. District Court, District of Georgia, Atlanta Division, because Petitioner was indicted by a U.S. Grand Jury and charged with violating statutes of the United States, namely 21 U.S.C. §841(a)(1) and 21 U.S.C. §846.

Argument

Petitioner's appeal to this Court is based upon his Constitutional right to effective assistance of counsel and upon this Court's supervisory powers.

---

[7] In light of the extremely unusual treatment accorded to Petitioner's Suggesion for Rehearing En Banc, the return of te "unfiled" Suggestion on December 23, 1982, must be treated as a denial of the rehearing for purposes of calculating the date for filing the within Petition. Therefore, the within Petition under S. Ct. Rule 20.4 had to be filed no later than February 21, 1983.

Under S.Ct. Rule 17.1, review on certiorari may be appropriate for any of the following reasons:

(a) when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; *** or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

As will be seen, application of these standards to the case at hand, mandates that certiorari be granted and that the Court of Appeals be reversed.

With respect to Petitioner's Constitutional right to effective assistance of counsel, the trial court committed reversible error (which was upheld by the Court of Appeals) in denying Petitioner's application to discharge trial counsel and allow a continuance for his new attorney to finish an out-of-state trial. The record below makes clear that trial counsel was not "counsel reasonably likely to render and rendering effective assistance." Vogle v. Watkins, 489 F.Supp. 901, 910 (N.D. Miss. 1980) (quoting MacKenna v. Watkins, 280 F.2d 592 (5th Cir. 1960), cert. denied 368 U.S. 877 (1961)). The record below unequivocally

establishes that trial counsel did not meet the constitutional standard for effective assistance of counsel first enunciated by this Court in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

Even a cursory review of the record reveals several errors which, although possibly "run-of-the-mill," fall far below effective assistance of counsel. Cross-examination of government witnesses was lethargic and at best luke-warm. Inadequate cross-examination has been found to be violative of a defendant's due process right to effective counsel. See Vogles, supra, 489 F.Supp. at 911. On the other hand, however, the government on direct examination was left free to ask its witnesses leading questions time and time again without objection from Petitioner's trial counsel. See, e.g., T.2/17/82 p.54.

Trial counsel also let the jury hear incompetent and inflammatory hearsay testimony. The following testimony of Mr. Sola, a co-defendant who became a key governmenmt witness, is illustrative:

> "Q. When you state that "this guy Ken," who are you referring to by that individual?
>
> A. Well, Mr. Innella.

[Tape played.]

Q. Who is Tony Pro?

A. This is the gangster from New Jersey who was in jail. That was -- Mr. Statler told me that he had some kind of deal with Mr. Reed as to be able to release Mr. Pro from jail or something to that effect. I just asked Mr. Sproat if he knew anything about that.

Q. What's Tony Pro's last name?

A. Provenzano.

Q. Tony Provenzano?

A. Yes, sir." (T.2/17/82 p. 62, 18 to p.63, 6)(emphasis added)

* * *

"Q. Did you have occasion in the Summer of 1981 to have several conversations concerning a cocaine deal?

A. Yes, sir.

Q. Who did you talk to about that?

A. Well, after that meeting with Mr. Reed, Mr. Statler gave Mr. Reed my telephone number. Mr. Reed called me and he says he was sorry about the -- that Mr. Jasper had a gun and there was some kind of problem, they had some kind of disagreement, that he would like for me to come down and talk with him; and he called several times in the process of seven, eight months. He called. He would leave his phone number, his of-

> fice, and I return calls. And he kept saying "when are you coming down?" But nothing was transacted. (T.2/17/82, p.47, Lines 21 to p.48, line 9. (emphasis added).

In no way should the jury have been allowed to hear this testimony. Mr. Sola's testimony came before the government established a conspiracy, the matters stated were clearly irrelevant to the issues in the case, and nothing was shown in furtherance of any conspiracy. A time frame for the conversations was not even established.

Most significantly, however, this incompetent hearsay testimony referring to "guns" and "gangsters" was especially prejudicial to Petitioner. He is of Italian descent, has an Italian name and he looks Italian. He is also from New Jersey and was tried by a federal jury in Atlanta, Georgia. Therefore, the "gangster" and "Tony Pro" hearsay was particularly damaging and particularly prejudicial to him. Trial counsel simply sat by without objection, however, as this testimony was heard by the jury.

Another example of trial counsel's ineffectiveness is his opening statement. He promised to show the jury evidence of the Petitioner's character and reputation. This was a promise that obviously could not be

fulfilled since trial counsel had already told the trial court that under no circumstances could he allow Petitioner to take the stand. Thus, it is incredible that trial counsel opened up Petitioner's character before the jury.

These errors fall below the constitutionally required standard of effective assistance of counsel. Yet they pale in comparison to the statement made by trial counsel at the outset of trial -- a statement which placed trial counsel and Petitioner in total opposition to one another.

At the very beginning of trial Petitioner asked the court to allow him to discharge trial counsel and for a continuance to allow substitute counsel to come in from an out-of-state trial. This was denied by the trial court. Trial counsel then stood up and told the court:

> There is a severe breach with Mr. Innella and myself as to the presentation of his defense. Mr. Innella, insists that he must take the stand, and that there are possibly one or two additional witnesses that he indicates he would like to testify in his defense.
>
> In good conscience, legal and moral and ethical, I feel I could not aid and abet such testimony.

* * *

> . . . I certainly am charged with responsibility of doing the utmost in his defense, at the same time, I could only proceed within the limits that I'm permitted to. I do feel that there is more than just a mutual dissatisfaction but there is a severe breach."
> (T.2/16/82 at p.5, l.10-25 to p.6, l.1-6) (emphasis added)

Any attorney or disinterested party hearing this statement would immediately realize that trial counsel told the court that his client, the Petitioner, wanted to take the stand and lie. Parenthetically, it is Petitioner's contention that the reverse was true, that trial counsel had prepared a story for Petitioner and it was Petitioner who could not bring himself to commit perjury. This was the source of their "severe breach." Petitioner has consistently expressed this contention in the appellate proceedings below, and in fact has submitted supporting affidavits with his reply brief to the Circuit Court of Appeals.

Petitioner's purpose in expressing this contention was to preserve the issue on appeal, to alert the Court to possible wrong-doing, and to present a correct statement of what actually occurred. Unfortunately, the Court of Appeals chose to focus on this contention and in its haste ignored the

record and Petitioner's claims based on the record. The Court of Appeals viewed Petitioner's contention as "serious" but suggested that the record was incomplete and relief might be more appropriate under 28 U.S.C. §2255. See Opinion, p.301.[8] The appellate court completely ignored Petitioner's arguments based on the record, however, such as the "run-of-the-mill" errors noted and, most critically, the statement of trial counsel made at the beginning of trial.

The appellate court became blinded by its preoccupation with Petitioner's contention and failed to adequately address in its opinion the statement of counsel made on the record. In fact, the court became so preoccupied that the Suggestion for Rehearing En Banc was not even accepted for filing. This rejection for filing was clearly contrary to the rules of the court and based on the fact that the Suggestion was prejudged

[8] Since the issue of ineffective assistance of counsel was raised on appeal and partially substantiated, a direct remand to the trial court, rather than 28 U.S.C. §2255 proceeding would be more appropriate. The remand procedure was used in Lowery, infra, 575 F.2d. at 729.

as "inappropriate." In rejecting the Suggestion for filing, Chief Judge Godbold informed present counsel that he would accept an "appropriate" petition.

It is unfortunate that the appellate court became so detached from the record before it. The Suggestion in fact focused squarely on the record and on trial counsel's statement under assumption it was true. The Suggestion, which was not "filed," specifically said:

> But even taking the statement at face value, and assuming arguendo it is true, effective assistance of counsel was unconstitutionally absent from the proceedings below. Suggestion, p.9 (emphasis in original).

It is indeed ironic that so far Petitioner has only been penalized, at the expense of the record, by raising his contention as to trial counsel's plans when he only sought to alert the court and protect his rights. For it is clear, if one only focuses on the record, as Petitioner has consistently urged, that the statement of trial counsel results in a total conflict between client and counsel.

Additionally, the failure of the appellate court to reverse on this ground is totally contrary to an opinion of another Court of

Appeals in Lowery v. Caldwell, 575 F.2d. 727 (9th Cir. 1978). In Lowery, the attorney by his actions communicated to the court and the jury that his client perjured herself. His manner of direct examination, his motion to withdraw, and his closing argument, conveyed that his client's testimony was false. Although his "suggestion" to the court was found to be in good faith, it was nonetheless constitutionally fatal to effective assistance of counsel.

Lowery is clearly applicable in the case at hand where trial counsel was not quite so equivocal. Here, Petitioner's trial counsel left nothing to the imagination; he simply announced in open court in so many words that Petitioner planned to take the stand and lie. In this regard, Lowery, is on point for two reasons. First, the seed planted in the trial judge's mind had the potential to influence the deciding of motions, objections, and ultimately sentencing,[9] even though the judge did not sit as the trier of fact.

Second, and most significantly, Lowery's concerns apply to a situation where counsel cannot serve his client and meet the con-

[9] With respect to sentencing, Petitioner who was a first time offender received two consecutive 15 year sentences -- the maximum permitted.

stitutional standard because they are in total opposition. These concerns were best expressed by Judge Hufstedler, who specifically concurred with the Lowery majority opinion:

> . . .[W]hen defense counsel moved to withdraw, he ceased to be an active advocate of his client's interests. Despite counsel's ethical concerns, his actions were so adverse to petitioner's interests as to deprive her of effective assistance of counsel. No matter how commendable may have been counsel's motives, his interest in saving himself from potential violation of the canons was adverse to his client, and the end product was his abandonment of a diligent defense. 575 F.2d at 732 (emphasis added)

These concerns expressed so well by Judge Hofstedler are clearly implicated here and they stand in sharp contrast to the handling of this case by the court of appeals. Once Petitioner and his trial counsel chose different paths, once placed in total opposition, effective representation as required by this Court and the Constitution went by the wayside. Even assuming trial counsel spoke the truth as to why Petitioner wished to discharge him, his statement to the court clearly "was adverse to his client, and the end product was his abandonment

of a diligent defnese." Id. (emphasis added).[10]

Certiorari is therefore appropriate because the handling of this case by the 11th Circuit Court of Appeals is totally contrary to Lowery v. Caldwell, supra, a decision of the 9th Circuit. Additionally, Certiorari is appropriate under the supervisory powers of this court.

While the right to effective assistance of counsel is clearly guaranteed by the due process clause of our Constitution, the events that have unfolded before the trial court call into question the appearance of

---

[10] Judge Hufstedler's concerns and the Lowery case which involved an attorney acting in good faith, are doubly applicable where trial counsel completely misled the Court as in this case, but this should not work to Petitioner's detriment. On the record before it, this Court must reverse.

Petitioner should not be forced to go through habeas relief or a remand, particularly, with its additional expense in order to develop the claim against trial counsel. This could be done by reference to the appropriate ethics review committee or district attorney for their consideration. When reversal may be had on the record, this burden should not be placed on Petitioner, who has already born the cost of trial (with ineffective counsel), appeal with present counsel, and ultimately faces retrial on the merits.

fairness and the integrity of the proceedings. The Petitioner requested to discharge trial counsel and for time to bring in substitute counsel already secured, but at trial in another state. This request was denied, although trial counsel informed the court that there was a "severe breach" between counsel and client and that the client wished to testify falsely. The court nonetheless required trial counsel and Petitioner to proceed with trial where Petitioner was ultimately convicted and sentenced to a total of thirty years in prison -- the permitted maximum.

Under such circumstances, the judicial proceedings became a sham, the appearance of justice merely an illusion. In United States v. Serubo, 604 F.2d. 807, 817 (3d Cir. 1979) the Court of Appeals, Third Circuit, said:

> ...the federal courts have an institutional interest, independent of their concern for the rights of the particular defendant in preserving and protecting the appearance and the reality of fair practice before the grand jury, an interest which could justify the imposition of a prophylactic rule in a proper case. (emphasis added).

Although Serubo is addressed to a grand jury setting, there is no reason why the same concerns for the appearance and reality of

fairness would not apply where a judge and jury sit. For as this Court specifically said in McNabb v. United States, 318 U.S. 332, 63 S. Ct. 608 (1943):

> ...the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as "due process of law" and below which we really reach what is trial by force. (emphasis added)

Thus, although it seems inescapable that a constitutional violation occurred here, this Court could also reverse and remand for a new trial based upon the supervisory powers of the Court so well described in McNabb, supra.[11]

---

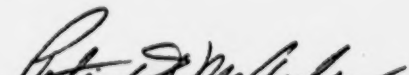
[11] Aside from the substantive issues, the procedural problem of the Court of Appeals not accepting the Suggestion for "filing" also is appropriate for an exercise of this Court's supervisory powers.

Conclusion

The statement of trial counsel in open court that his client wished to take the stand and lie, and his other trial errors, are shockingly below the constitutional standard of effective assistance of counsel -- his statement places counsel and client at war with one another. His statement, plus his trial errors, also cannot withstand a proper exercise of this Court's supervisory powers.

Based on the foregoing, we respectfully request that this Court grant the within Petition, reverse the Court of Appeals, and remand for a new trial with Counsel of Petitioner's Choice.

JOHN J. PRIBISH, ESQ.

By 

PATRICK F. McANDREW

Feb. 15, 1983

UNITED STATES of America,
Plaintiff-Appellee,

v.

Kenneth Richard INNELLA,
Defendant-Appellant.

No. 82-8218
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Nov. 1, 1982.

Defendant was convicted in the United States District Court for the Northern District of Georgia, Charles A. Moye, Jr., Chief Judge, of conspiracy to possess with intent to distribute cocaine and attempting to possess with intent to distribute cocaine, and he appealed. The Court of Appeals, Godbold, Chief Judge, held that: (1) trial court did not abuse its discretion in denying continuance; (2) issue of whether defendant's trial counsel was ineffective could not be decided in instant appeal; and (3) defendant's objective acts were unequivocal thus supporting his conviction for attempt.

Affirmed.

Synopses, Syllabi and Key Number Classification

The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

1. Criminal Law -- 614(1)

Trial court did not abuse its discretion in denying continuance where defendant's counsel had been granted two continuances on medical grounds, where on date of trial defendant sought continuance to secure new counsel, and where putative new counsel notified court he could not attend trial for several weeks.

2. Criminal Law -- 1128(2)

Issue of whether defendant's trial counsel was ineffective could not be decided in instant appeal because many of the factual allegations set out in defendant's brief concerning trial counsel involved matters not of record.

3. Criminal Law -- 44

To be convicted of attempt the defendant's objective actions, taken as a whole, must strongly corroborate the required culpability.

4. Drugs and Narcotics -- 123

Defendant's words and actions were consistent with attempt to purchase a controlled substance, and thus his objective acts were unequivocal and supported his conviction for attempting to possess with intent to distribute cocaine; actions or

intentions of undercover agent, which defendant contended made his conduct equivocal, were not a relevant reflection of his underlying intent.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

GODBOLD, Chief Judge:

Appellant was convicted of conspiracy to possess with intent to distribute cocaine and for attempting to possess with intent to distribute cocaine.

[1] Defendant's counsel was granted two continuances on medical grounds. On the date of the trial, February 17, 1982, defendant sought a continuance to secure new counsel. The court consented provided that the trial not be delayed, but the putative new counsel, from New Jersey, notified the court that he could not attend a trial until March 1. The court then denied a continuance. In these circumstances the court did not abuse its discretion.

[2] Appellant contends that his trial counsel was ineffective. This issue cannot be decided in this appeal because many of the

factual allegations set out in appellant's brief concerning trial counsel involve matters that are not of record. These serious charges, not supported by any evidence in this record, are inappropriately made. Trial counsel has had no means or opportunity to respond to them, and no determination has been made of whether the charges have even a glimmer of merit. If appellant wishes to raise an ineffective counsel issue 28 U.S.C. § 2255 is available to him.

[3,4] With respect to the attempt count, the defense of impossibility, asserted in reliance on U.S. v. Oviedo, 525 F.2d 881 (5th Cir. 1976) is of no help to appellant. Oviedo focused on the objective acts of the defendant.

> W]e demand that in order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law.

Id. at 885. The court in Oviedo distinguished U.S. v. Mandujano, 499 F.2d 370 (5th Cir. 1974). In Mandujano the defendant

negotiated a sale of heroin with an undercover agent. After taking the agent's money the defendant was unable to locate his source. He then returned the money to the agent. The defendant was convicted of attempted distribution and the Fifth Circuit affirmed. In distinguishing Mandujano the Oviedo court stressed that Mandujano's acts were unequivocal: he accepted the money and stated that he would purchase heroin with that money. In contrast, Oviedo's objective acts were inconsistent: he stated he would sell heroin but then sold an uncontrolled substance. In sum, to be convicted of attempt the defendant's objective actions, taken as a whole, must strongly corroborate the required culpability.

In the present case Innella's objective acts were unequivocal. His words and actions were consistent with an attempt to purchase a controlled substance. Innella argues that the actions or intentions of the undercover agent were inconsistent with a criminal enterprise, and, therefore, the objective basis required to convict him of attempt was not present. Oviedo focuses on the objective acts of the accused. The act which Innella claims makes his conduct equivocal was an act of a government agent

and thus not a relevant reflection of his underlying intent. See U.S. v. Korn, 557 F.2d 1089 (5th Cir. 1977).

AFFIRMED.

Adm. Office, U.S. Courts - West Publishing Company, Saint Paul, Minn.

UNITED STATES COURT OF APPEALS
Eleventh Judicial Circuit

John C. Godbold
Chief Judge
Post Office Box 1589
Montgomery AL 36102

November 24, 1982

Mr. John J. Pribish
Attorney at Law
850 U.S. Highway No. 1
No. Brunswick, NJ 08902

RE: U.S. v. Innella
82-8218

Dear Mr. Pribish:

I am directing the clerk of this court to return to you the petition for rehearing/ rehearing en banc received by the clerk November 22, 1982. It will not be accepted for filing.

Your zeal has outrun your sense of propriety and a decent regard for the character and reputation of another lawyer.

Your petition repeatedly states that trial counsel committed a falsehood and committed the crime of subornation of perjury. These matters are recited as facts as though judicially established or as though uncontroverted and uncontrovertible. Your statements are not facts but are only contentions made by you and, obviously, originating in statements made by your client to you of

events that he says occurred. Your statements have not been determined by any court to be true or false, have not been presented to any court that could establish whether they are true or false, and are not matters of record.

If you want to make these serious charges against another lawyer you can make them in a § 2255 hearing in the district court where they can be made in a proper manner. Your client can then testify under oath and subject to the penalties of perjury concerning what he says occurred. The attorney whose integrity you have attacked can have an opportunity to appear and to give his version.

You have the right to seek a rehearing/-rehearing en banc with respect to paragraph 2 of the court's opinion. But this court will not permit you to do so by defaming a trial attorney through stating as facts matters that at this juncture are nothing more than contentions.

You may file a proper petition within 15 days from date if you wish.

Sincerely yours,

/s/

John C. Godbold
Chief Judge

JCG:mbl

December 8, 1982

Honorable John C. Godbold
Chief Judge
United states Court of Appeals
Post Office Box 1589
Montgomery, AL 36102

Re: U.S. v. Innella
Docket No. 82-8218

Dear Judge Godbold:

I am in receipt of your Honor's letter dated November 24, 1982, which I received November 29, 1982. If the spirit of His Honor's letter was to save me some unperceived embarrassment, then I apologize. But, if, as I sense, the spirit of the letter was to admonish me, then I am highly offended.

At the outset, let me emphasize that I am as sensitive as His Honor with respect to the issue of examining another lawyer's competence and integrity in the handling of a criminal matter. I have been Chief Trial Counsel and Supervising Assistant Prosecutor of a Prosecutor's Office in New Jersey, and this has had a callousing effect on me when information regarding a lawyer's conduct is presented to me by a defendant. However, when that information, to wit: the client was instructed by counsel to take the stand and tell a concocted story, is corrobated by two (2) independent witnesses -- one of whom is a former D.E.A. Agent - then

it is incumbent upon counsel to bring that information to the attention of the court to prevent a miscarriage of justice.

Moreover, my sense of zeal is founded in the belief that a defendant in a criminal proceeding is entitled to receive, and the attorney is obligated to give, representation that reflects the highest principles of the bar. In this conviction, my sense of propriety is a commitment to the prevention of a miscarriage of justice - a lawyer who allegedly proposes to a client to tell the jury a concocted story defames himself as well as the administration of justice. Concommitantly, the decent regard for the character and reputation of another attorney must never be so ironclad that it prevents judicial and/or lawyer scrutiny. Here, trial counsel's alleged action impugned the system which was designed to protect the Defendant and his Constitutional rights.

When the aforesaid information was received, and corroborated, an attempt was made at the time of my engagement to seek an adjournment at the trial level in order to file the appropriate motion. This application was denied at sentencing. Thereafter, there were two alternative courses to pursue. One (the course which was pursued here), to file the affidavits in the Appellate proceeding, seek oral argument and

ask for a remand. The other course was a collateral attack by way of 28 U.S.C. 2255. In this regard, I am not unmindful that there appears to be a split of authority as to procedure. Compare United States v. Goodwin 446 F.2d 894 (9 Cir. 1971) with United States v. Lucas 513 F.2d 509 (Cir. 1973).*

* In United States v. Goodwin, supra, the court in Defendant's application for reversal based upon inadequate counsel stated: "the record on direct appeal provides no basis for ruling on his conclusionary allegations . . . there is nothing in the record to indicate that his representation by ( ) counsel was so gross on its face as to amount to a denial of due process. If there are facts outside the record which would support appellant's allegations, they must be presented in an application under 28 U.S.C. §2255." 446 F.2d at 895. On the other hand, in United States v. Decoster, 624 F.2d 196 (1976), the court sua sponte remanded the matter to the trial court for a hearing regarding the effectiveness of Defendant's trial counsel -- the Defendant did not raise the issue and it was not apparent in the record. See 624 F.2d at p217. In United States v. Lucas, supra after oral argument but prior to disposition, the court was informed the Defendant's trial counsel was not a member of the bar where the trial took place. The court remanded the matter to the trial court to conduct hearings and complete the record with respect to that issue. The court further noted, in a footnote at p512 that:

"7. Some of the cases in which this court has remanded the record to allow further trial court exploration of the

In view of the foregoing, I wouldurge that His Honor reconsider His remarks and re-examine the Appellant's Reply Brief and Suggestion For ReHearing En Banc. Contrary to the implication raised in His Honor's letter, the information concerning trial counsel's statements has been sworn to in affidavits based upon personal knowledge. Concededly these sworn statements raise serious issues regarding the character and conduct of trial counsel, but they also bear just as heavily on the issue raised by the Defendant that he was denied effective representation. Moreover, the thrust of the Suggestion is based not on these statements and affidavits, but rather trial counsel's statement on the record. Taking his statement at face value and assuming

---

ineffectiveness issue include De-Coster, supra; United States v. Hurt, 72-2229 (remanded April 22, 1974); United States v. Simpson, D.C.Cir. 495 F.2d 1076 (remanded April 26, 1974). As in the instant case, these remand proceedings have on occasion led the trial judge to find that trial counsel was ineffective and that a new trial was indeed warranted. See, e.g. United States v. Simpson, supra."

counsel acted n good faith, reversal is nevertheless mandated. Accordingly, I respectfully request that your Honor rescind His instruction to the Clerk of the Court and permit the Defendant to formally file the Suggestion for ReHearing En Banc as previously framed.

I await His Honor's advice.

Respectfully Submitted,

/s/

JOHN J. PRIBISH

JJP:JS
~~Enclosure~~
cc: Craig Gillen

UNITED STATES COURT OF APPEALS
Eleventh Judicial Circuit

John C. Godbold
Chief Judge
Post Office Box 1589
MOntgomery, AL 36102

December 13, 1982

Mr. John J. Pribish
Counsellor at Law
850 U.S. Highway 1
North Brunswick, N.J. 08902

Re: U.S. v.Innella, 82-8218

Dear Mr. Pribish:

In your opening brief in this case (p.14) you said:

> That is, counsel attempted to fabricate a defense and sought to compel APPELLANTS'S cooperation by having APPELLANT testify falsely.

Nothing in the record supported this unqualified statement by you.

In its brief (p. 9), the government said:

> Claims of inadequate representation cannot be determined on direct appeal when such claims were not raised before the trial court and there has been not [sic] opportunity to develop and include in the record evidence bearing on the merits of the allegation. (Citations)

You then filed a reply brief in which you said (p. 11):

> It was, of course, trial counsel who wanted APPELLANT to take the stand and lie and APPELLANT who could not bear to do so.

You purported to "file" with the court as a "supplemental appendix" ex parte affidavits dated after the date of the government's brief and a day or two before your reply brief was filed. There is no authority under the rules and procedures of this court for expanding the record in this fashion, and had you filed a motion for leave to file the affidavits it would have been summarily denied.

In its opinion the court treated gently your incorrect procedural effort to expand the record. Rather it pointed out that you were inappropriately asserting matters orf the record and that accused trial counsel had no opportunity to respond to the outside-the-record allegations made nor had any determination been made of whether the charges had "even a glimmer of merit." We pointed out to you the availability of § 2255.

On petition for rehearing en banc, you reiterated your statements that trial counsel asked the appellant to take the stand and lie and that defendant was entitled to discharge trial counsel because counsel had attempted to have defendant take the stand and perjure himself. Your statements in the petition, like those in earlier briefs, were not qualified as allegations or contentions

but were recited as facts as though judicially established or as though uncontroverted and uncontrovertable. Whatever the truth of what occurred, trial counsel, accused by you of wrongdoing including subornation of perjury, has rights too -- to have the issue of his conduct raised in a context in which he may be present, may deny your allegations, offer contrary evidence, and subject his accusers to cross examination. Until that time you have no right to refer to your allegations against him as facts. It is only in your letter of December 8 that you recede to characterizing what you have said as "allegations."

It is puzzling that, after this court in its opinion pointed out to you the inappropriateness of what you had done, there would be a repetition in your petition for rehearing en banc.

This court has not suggested that you should not zealously pursue your client's interest even though the actions of another attorney may be involved. We spend a great deal of our time handling ineffective counsel cases. Rather we have said, and reiterate, that the manner in which you attempted ex parte to expand the record in this case, and the references to counsel's conduct as matters of fact rather than alle-

gations or inference, were inappropriate and were unfair to the person involved. We would have the same view were he not a lawyer.

Treating your letter as a petition for reconsideration, it is DENIED.

If you wish to file an appropriate petition for rehearing/rehearing en banc, you are allowed 15 days in which to do so. There will be no extension.

Sincerely,

/s/

John C. Godbold
Chief Judge

JCG:jb

UNITED STATES COURT OF APPEALS
Eleventh Circuit
Office of the Clerk

NORMAN E. ZOLLER
Clerk

Tel. 404-221-6187
FTS-242-6187
56 Forsyth St. N.W.
Atlanta, Georgia 30303

Mr. John J. Pribish
Attorney at Law
850 U.S. Highway No. 1
North Brunswick, New Jersey 08902

No. 82-8218 U.S.A. v. INNELLA

Dear Counsel:

In accordance with this court's directive on November 24, 1982, I am returning to you unfiled your copies of the petition for rehearing en banc received in this office on November 22, 1982.

Sincerely,

NORMAN E. ZOLLER, CLERK

By /s/
Shelda V.Harris
Case Manager

SVH:ss

Enclosure

cc: Mr. Craig Gillen, Assistant U.S. Attorney - Atlanta